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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	Case No. 17-CR-0609 VC
)	
Plaintiff,)	UNITED STATES' SENTENCING
)	MEMORANDUM
v.)	
)	Sentencing Date: June 6, 2022
JOSE INEZ GARCIA-ZARATE,)	Time: 9:30 a.m.
)	Judge: Hon. Vince Chhabria
Defendants.)	
)	
)	

I. INTRODUCTION

On July 1, 2015—approximately seven years ago—Defendant illegally possessed a loaded firearm on Pier 14 in San Francisco, tragically shooting a young woman as she walked along the pier with her father and a family friend. Shortly after Defendant's arrest in San Francisco that same evening, the victim succumbed to her injuries from the shooting. Since the day of that tragedy, Defendant has been rightly held in continuous state and federal custody. Indeed, a substantial custodial sentence has been warranted in this case to hold Defendant accountable for his serious crimes and to protect the public.

1 Probation agrees, recommending a sentence of 120 months (10 years)—the statutory maximum
2 for Defendant’s conviction. The government acknowledges Probation’s position and significant
3 recommendation of imprisonment in light of Defendant’s reckless conduct with the illegal possession of
4 a stolen, loaded firearm that led to the death of the victim, and given Defendant’s lengthy criminal
5 history.

6 Defendant has now spent 30 months in state custody followed by about 53 months in federal
7 custody, for a total of about 7 years (83 months) in custody related to this matter. To the extent that the
8 Bureau of Prisons would credit Defendant’s time in state custody and Defendant would receive good
9 time credit, Defendant will have served the equivalent of a 98-month (approximately eight year)
10 sentence by the date of the sentencing hearing. Accordingly, the government does not oppose a sentence
11 of time served in this matter, which would be the equivalent of a sentence of approximately 98 months
12 of imprisonment with these assumptions.

13 Defendant is also subject to a separate and additional detainer for a violation of supervised
14 release from the Western District of Texas that may result in custody time further to this matter, as well
15 as an additional detainer from Immigration and Customs Enforcement that may result in Defendant’s
16 deportation from the United States.

17 **II. BACKGROUND**

18 **A. Factual Background**

19 On May 12, 2011, Defendant was convicted in the Western District of Texas of illegal reentry
20 into the United States after deportation in violation of 8 U.S.C. § 1326. *See* Presentence Investigation
21 Report (Dkt. No. 152) (“PSR”) ¶ 55. The district court sentenced Defendant to 46 months of
22 imprisonment and three years of supervised release. *Id.* Prior to this conviction, Defendant had been
23 sentenced to 51 months of imprisonment in 2003 and 63 months of imprisonment in 1998 for similar
24 violations (in addition to other prior convictions for controlled substances offenses). PSR ¶¶ 53–54.

25 Following Defendant’s completion of his most recent term of imprisonment, the Bureau of
26 Prisons placed Defendant on federal supervised release on March 26, 2015 and transferred him to the
27 custody of Immigration and Customs Enforcement (ICE). *Id.* ICE then transferred Defendant to the
28 custody of the San Francisco Sheriff’s Department for a warrant on a pending charge of Transport/Sale

1 of Controlled Substance originating from October 26, 1995. *Id.* The next day, that matter was
 2 dismissed by authorities in San Francisco on March 27, 2015. PSR ¶ 60. On April 15, 2015, the San
 3 Francisco Sheriff's Department released Defendant from local custody instead of transferring him back
 4 to federal immigration authorities. PSR ¶ 55.

5 On June 27, 2015, a federal law enforcement ranger reported a burglary of his car that occurred
 6 on the Embarcadero in San Francisco, in which the stolen items from his car included his Sig Sauer
 7 P239 firearm and a magazine. PSR ¶ 18.

8 **B. The Instant Offense**

9 Four days later, on July 1, 2015 at about 6:30 pm in San Francisco, 31-year-old Kathryn "Kate"
 10 Steinle, her father, and a family friend were walking along Pier 14 on the Embarcadero, a known tourist
 11 sightseeing location. PSR ¶¶ 9–10. At the same time, passersby saw Defendant spinning in circles in a
 12 swivel chair. *See* Dkt. No. 46-1 at JGZ-5189. Tragically, Defendant also knowingly possessed the same
 13 Sig Sauer P239 firearm loaded with ammunition while he was on the pier. Dkt. No. 149 (Open Plea
 14 Application). A gunshot rang out and Kate Steinle said "Dad help me," falling to the ground. PSR ¶ 10.
 15 She had been shot in her back by a bullet fired from that same firearm. *Id.*

16 Defendant had been sitting in a chair on the pier approximately 90 feet away from Kate Steinle at
 17 the time she was struck by the bullet. PSR ¶ 23. In the immediate moments after Kate Steinle fell to the
 18 ground, a splash could be observed in the bay water directly below where Defendant had been sitting,
 19 consistent with Defendant throwing the firearm into the water. *Id.* Defendant then walked away from
 20 the crime scene in the direction of the Embarcadero. *Id.* At the time Defendant possessed the firearm,
 21 Defendant knew he was an alien who was unlawfully and illegally in the United States, and knew he had
 22 been previously convicted of a crime punishable by more than 1 year in prison (including a crime for
 23 which he spent several years in federal prison). Dkt. No. 149.

24 Numerous witnesses provided San Francisco Police Department (SFPD) officers with a
 25 description or photographs of Defendant, who was observed walking away from the scene. PSR ¶ 11.
 26 At approximately 7:24 pm, SFPD officers located Defendant and arrested him, securing his hands and
 27 collecting samples from gunshot residue kits before taking him into custody. PSR ¶ 12. At 8:22 pm,
 28 Kate Steinle was pronounced deceased by medical staff at San Francisco General Hospital as the result

1 of the gunshot wound. PSR ¶ 14.

2 After Defendant was transported to the police station and advised of his Miranda rights,
3 Defendant confessed to the shooting. PSR ¶ 16. Among other things, Defendant confirmed that he fired
4 the firearm once, that he fired the bullet, and that he was seated at that time. *Id.* He also stated that he
5 had been pointing the gun at various animals or at fish from the pier. *Id.* He also stated that he
6 remembered that the firearm was a semiautomatic gun (as opposed to a revolver). *Id.*

7 The next day, the same firearm was recovered by the SFPD Marine Unit in a dive operation at
8 Pier 14. PSR ¶¶ 17, 24. The firearm was examined to confirm that all safeties were functional and in
9 good working order with no defects. PSR ¶ 22. A gunsmith from Sig Sauer inspected the firearm and
10 concluded that the pistol would have only fired with a pull of the trigger. Samples taken from
11 Defendant's hands would also later yield a positive result for gunshot residue, according to SFPD
12 laboratory analysis. PSR ¶ 21. Defendant remained in local custody from his arrest on July 1, 2015
13 until his transfer to federal custody in January 2018. PSR at 2.

14 **C. Procedural Background**

15 Defendant was charged with a number of crimes in San Francisco Superior Court as a result of
16 the tragic incident, including homicide and being a felon in possession of a firearm. *People v. Garcia*
17 *Zarate*, Case No. 15014736 (S.F. Sup. Ct. 2015). Following a jury trial, Defendant was acquitted of the
18 homicide charges but convicted of being a felon in possession of a firearm. Defendant appealed the sole
19 conviction, arguing that it was error for the state court not to offer a transitory possession instruction (a
20 defense not available in federal court for illegally possessing a firearm). *See* Dkt. No. 60-2.

21 A federal grand jury indicted Defendant on December 5, 2017 for violating 18 U.S.C.
22 § 922(g)(1) (Count 1, Felon in Possession of a Firearm and Ammunition) and 18 U.S.C. § 922(g)(5)
23 (Count 2, Alien in Possession of a Firearm and Ammunition). Dkt. No. 1. Defendant made his first
24 appearance in federal court in this matter on January 8, 2018 and he was detained. Dkt. No. 3.

25 In August 2018, the Court granted Defendant's request to continue this matter until the Supreme
26 Court decided *Gamble v. United States*. Dkt. No. 19. In June 2019, the Supreme Court decided
27 *Gamble*, rejecting the petitioner's arguments and upholding the dual-sovereignty doctrine. *Gamble v.*
28 *United States*, 139 S. Ct. 1960 (2019). This prosecution then proceeded.

1 On August 30, 2019, a California appellate court reversed Defendant's sole state conviction for
2 failure to give the transitory possession instruction. *See* Dkt. No. 60-2 (*People v. Garcia Zarate*, Case
3 No. A153400 (Cal. Ct. Appl. 1st Dist. August 30, 2019 Order)).

4 In view of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), on October 17, 2019, the grand jury
5 returned a Superseding Indictment adding the requisite element of Defendant's knowledge to the same
6 charges of being a felon and an alien in possession of a firearm and ammunition. *See* Dkt. No. 29. On
7 November 5, 2019, Defendant was arraigned on the Superseding Indictment. Dkt. No. 33. During the
8 arraignment, Defendant expressed some confusion about the proceedings and admitted in open court
9 "it's just one charge – one charge, it being illegal to have a weapon in my pants, the one that I had that
10 day at Embarcadero, in my pants pocket." Dkt. No. 42 at 3:22–25.

11 A federal jury trial was set in this matter for January 2020. Dkt. 26. In the days before trial, the
12 Court ordered Defendant to be evaluated for mental competency to stand trial. Dkt. No. 95, 100. The
13 evaluation led to an additional order on February 21, 2020 committing Defendant to the custody of the
14 Attorney General for further examination and treatment. Dkt. No. 111. On October 19, 2020, following
15 competency proceedings, the Court committed Defendant to the custody of the Attorney General for
16 treatment. Dkt. No. 124. After receiving treatment at a Bureau of Prisons facility, Defendant returned
17 to attend court proceedings in this district in August 2021. Dkt. No. 132. Following further competency
18 evaluations, on March 14, 2022, Defendant pleaded guilty to Counts 1 and 2 of the Superseding
19 Indictment without a plea agreement. Dkt. Nos. 149 & 150.

20 Sentencing is set for Monday, June 6, 2022, at 9:30 a.m. Defendant has now spent 30 months in
21 state custody followed by about 53 months in federal custody for this matter, for a total of about 7 years
22 (83 months) in custody.

23 Defendant is currently subject to two additional detainers: (1) one arising out of the U.S. District
24 Court in the Western District of Texas related to the matter for which Defendant was on supervised
25 release at the time of the offense; and (2) one from ICE. PSR at 2.

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1 **III. DISCUSSION**

2 **A. Applicable Law**

3 The Court should impose a sentence sufficient, but not greater than necessary, to reflect the
 4 purposes of sentencing that Congress identified in 18 U.S.C. § 3553(a)(2). *United States v. Carty*, 520
 5 F.3d 984, 991 (9th Cir. 2008). The Court should begin the process of determining an appropriate
 6 sentence by calculating the correct sentencing range under the Guidelines. *Id.* After determining the
 7 appropriate Guidelines calculations, the Court should then evaluate the sentence for substantive
 8 reasonableness in light of the factors set out in Section 3553(a). *Carty*, 520 F.3d at 991–93. Under 18
 9 U.S.C. § 3553(a), in arriving at the appropriate sentence for the defendant, the Court should consider
 10 these factors applicable to this case, among others:

- 11 (1) the nature and circumstances of the offense and the history and
 12 characteristics of the defendant;
- 13 (2) the need for the sentence imposed to reflect the seriousness of the
 14 offense, to promote respect for the law, and to provide just
 15 punishment for the offense;
- 16 (3) the need for the sentence imposed to afford adequate deterrence to
 17 criminal conduct; and
- 18 (4) the need to avoid unwarranted sentence disparities among
 19 defendants with similar records who have been found guilty of
 20 similar conduct.

18 **B. Guidelines Calculation**

19 The United States Probation Office (“Probation”) correctly calculates the United States
 20 Sentencing Guidelines (“Guidelines”) in the PSR. *See* PSR ¶¶ 30–40.

21 The government agrees with Probation that Defendant’s criminal history score is eleven, which
 22 includes the addition of two points because Defendant committed this offense while on supervised
 23 release from the Western District of Texas. PSR ¶¶ 56–58.

24 The government also agrees with Probation that the base offense level is correctly calculated as
 25 18. PSR ¶ 31. The applicable guideline is U.S.S.G. § 2K2.1(c)(1)(B), which provides a cross reference
 26 to Chapter Two, Part A, Subpart 1 (Homicide), because death resulted from Defendant’s use and
 27 possession of the firearm and the resulting offense level is greater than determined by applying 2K2.1.¹

28 ¹ When applying U.S.S.G. § 2K2.1, a Base Offense Level of 14 is applicable pursuant to
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1 It is undisputed that the bullet that struck and killed Kate Steinle was fired from the firearm that
2 Defendant possessed while he was on Pier 14. PSR ¶ 24.

3 In addition, U.S.S.G. § 2A1.4(a)(2)(A) (involuntary manslaughter) applies in this case in view of
4 Defendant's reckless conduct. In light of the observations from the scene, Defendant's numerous
5 incriminating statements to interviewing officers following his arrest, and Defendant's additional
6 admissions following his arrest, Defendant acted recklessly in illegally possessing the firearm and firing
7 it. As described above, Defendant was observed spinning on a swivel chair while seated on the pier
8 immediately before Kate Steinle was shot. After the shooting, Defendant threw the firearm into the
9 water and made no attempt to assist the victim, immediately walking away from the crime scene instead.
10 Following his arrest, Defendant made several admissions about his reckless conduct, including that he
11 fired the bullet from the firearm while he was seated on the pier, and that he was pointing the gun at
12 various animals including a seal or fish—consistent with the observations of passersby that he was
13 spinning around on a swivel chair while seated on the pier. He also specifically identified that the
14 firearm was a semiautomatic firearm (*i.e.*, not a revolver), which would require his direct view of the
15 weapon when possessing it (not obstructed, for example, by a rag). Consistent with this, Defendant later
16 admitted in open court during the proceedings of this case that he had a gun in his pants pocket that day
17 on the Embarcadero. When entering his guilty plea, Defendant also admitted that at the time he
18 possessed the firearm, he knew he was an alien who was unlawfully and illegally in the United States,
19 and knew he had been previously convicted of a crime punishable by more than 1 year in prison
20 (including a crime for which he spent several years in federal prison). The illegal possession of firearms
21 is itself a danger to the community. Even more, Defendant's behavior while knowingly and illegally
22 possessing the loaded firearm on Pier 14—including what was apparently playing with and pointing a
23 loaded firearm, discarding the firearm into the bay after the shooting, and fleeing the crime scene—was
24 egregiously reckless conduct as contemplated by U.S.S.G. § 2A1.4 under a preponderance of the
25 evidence. The defense theory of an innocent “gun in a rag” not only selectively cherry-picks from
26 numerous of Defendant's incriminating statements to interviewing officers, but further requires ignoring
27

28 U.S.S.G. § 2K2.1(a)(6) and a two-level increase pursuant to U.S.S.G. §2K2.1(b)(4)(A) applies because
the firearm was stolen, resulting in an offense level of 16.

1 all the aforementioned facts.

2 Defendant receives a two-point reduction for acceptance of responsibility, but not a third point
3 given that Defendant entered his pleas after the government already prepared for a jury trial. PSR
4 ¶¶ 38–39. According, the total offense level is 16.

5 Given a total offense level of 16 and a Criminal History Category of V, the Sentencing
6 Guidelines imprisonment range is 41 months to 51 months. PSR ¶ 98.

7 **C. Statutory Maximum Penalties**

8 Defendant was charged with two separate statutory subdivisions of 18 U.S.C. § 922 that bar the
9 possession of a firearm and ammunition by virtue of two disqualifying statuses, and he has pleaded
10 guilty to both counts. In these circumstances, the Court should not impose separate sentences for each
11 count because the offenses merge at sentencing; the maximum penalty for the two counts, therefore, is
12 10 years (or 120 months) total of imprisonment. *See, e.g., United States v. Shea*, 211 F.3d 658, 673 (1st
13 Cir. 2000); *United States v. Zareck*, 588 F. App'x 100, 101 (3d Cir. 2014); *United States v. Thomas*, 426
14 F. App'x 459, 461 (7th Cir. 2011); *United States v. Hooks*, 33 F. App'x 371, 373 (10th Cir. 2002).

15 **D. Recommendation**

16 A review of the Guidelines and 18 U.S.C. § 3553(a) factors supports a substantial custodial
17 sentence. Probation recommends the statutory maximum for Defendant's conviction, which is 120
18 months (10 years) of imprisonment. The government acknowledges Probation's position and its
19 significant recommendation of imprisonment, given Defendant's reckless conduct in the instant offense
20 with the illegal possession of a stolen, loaded firearm that led to the death of the victim, and in view of
21 Defendant's lengthy criminal history.

22 Specifically, the nature and circumstances of the offense weigh in favor of a substantial custodial
23 sentence. In this case, Defendant recklessly and illegally possessed a loaded firearm in a busy public
24 place on Pier 14 in San Francisco, which resulted in the shooting of the victim as she walked along the
25 pier. While the killing of this victim may not have been intentional, it is clear that Defendant's illegal
26 possession of the firearm was no accident, and his firing of it was at the very least reckless. Defendant
27 admitted to authorities that he fired the firearm while seated, that he was pointing it at various things,
28 and that he knew it was a semiautomatic firearm (as compared to a revolver). Rather than checking on

1 the victim after the shooting, he immediately threw the weapon into the water and fled the scene. The
 2 victim tragically died from the shooting. A substantial custodial sentence is supported given these facts
 3 and warranted in view of the need to recognize the seriousness of the offense, promote respect for the
 4 law, and to provide just punishment for the offense.

5 With respect to the history and characteristics of the defendant, Defendant has a lengthy criminal
 6 history spanning decades around the country, ranging from felony controlled substances offenses to
 7 repeated illegal re-entry violations after deportation for which he served significant prison time. As
 8 such, Defendant's criminal history also supports a substantial custodial sentence. Likewise, in view of
 9 the need for the sentence imposed to afford adequate deterrence to criminal conduct, the government
 10 notes that Defendant's lengthiest custodial punishment thus far was a 63-month term of imprisonment
 11 for illegal re-entry after deportation in 1998, which did not appear sufficient to deter Defendant from
 12 illegally reentering the United States again.

13 On the other hand, the government acknowledges that Defendant has a long history of treatment
 14 for mental health issues. Defendant is also subject to a separate detainer for a violation of supervised
 15 release from the Western District of Texas that may result in additional custody time further to this
 16 matter, as well as an additional detainer from Immigration and Customs Enforcement that may result in
 17 Defendant's deportation from the United States.

18 Accordingly, the government does not oppose a sentence of time served (which would be the
 19 equivalent of a sentence of approximately 98 months of imprisonment, to the extent that the Bureau of
 20 Prisons would credit Defendant's time in state custody and Defendant would receive good time credit),
 21 followed by three years of supervised release in this matter, based upon a consideration of the
 22 Guidelines and 18 U.S.C. § 3553(a) factors.

23 DATED: May 31, 2022

Respectfully submitted,

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 25 United States Attorney

26 /s/
 27 ERIC CHENG
 28 KEVIN BARRY
 Assistant United States Attorneys